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No. 87-570 (6)

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

NICHOLAS COLAFELLA, K. LEROY IRVIS, JAMES J. MANDERINO, MATTHEW J. RYAN, AND THE BI-PARTISAN COMMITTEE FOR THE ADMINISTRATION OF THE HOUSE OF REPRESENTATIVES,

— Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF THE KANSAS LEGISLATIVE COORDINATING COUNCIL AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED FOR REVIEW

Whether members of an investigative committee of a state legislature, who are not themselves targets of a federal criminal investigation, may resist a federal grand jury subpoena for their investigative documents and reports served during an ongoing legislative investigation?

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CONSTITUTIONAL PROVISIONS

Kan. Const. Art. 2, §1. 3

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INTEREST OF THE AMICUS

Amicus, Kansas Legislative Coordinating Council (Council), is a statutory body consisting of the president of the senate, the speaker of the house of representatives, the speaker pro tem of the house of representatives, the majority leader of the senate, the majority leader of the house of representatives, the minority leader of the senate, and the minority leader of the house of representatives. The legislative coordinating council has general authority over all legislative services and represents the legislature when the legislature is not in session.

The 1987 Regular Session of the Kansas House of Representatives and the Kansas Senate adjourned sine die on May 21, 1987. A special session of the legislature of the state of Kansas

convened August 31, 1987 and adjourned sine die on September 5, 1987.

At a duly called meeting of the Council held September 17, 1987 the Council, by motion passed by the required statutory majority vote, determined that the Council on behalf of the Kansas Senate and the Kansas House of Representatives would file an amicus curiae brief in support of the Pennsylvania House of Representatives' petition for writ of certiorari in this case. The Kansas Senate and the Kansas House of Representatives are legislative entities duly elected and empowered to legislate for the public good in the state of Kansas as determined by the Constitution of Kansas, Article 2, §1: "The legislative power of this state shall be vested in a house of representatives and senate."

ARGUMENT

Crucial to any legislative entity is enlightened debate on a wide range of issues. To function intelligently and legislate effectively legislative entities must have adequate information. In order to assure acquisition of such information, the legislative body must have the power to investigate, either by the entire entity or its various committees.

The legislative power to investigate is a necessary and implied component of the general power to legislate, although the Constitution omits any mention of such a power. Legislative investigation requires the existence of an independent legislature free from influence, harassment, and threats of disruption from the executive

and judicial branches of both state and federal governments.

The Kansas Legislature and amicus have in the past and expect to continue to undertake fact-finding investigations to support effective legislation.

Such investigations have been hampered by subpoenas served or threatened by state and federal entities. These subpoenas have interfered with the efficiency of investigations in the legislative process and distracted legislators and especially members of the investigating committees and their staff. Also, they require expenditures of money and human resources in complying with or moving to quash such subpoenas or in forestalling the issuance and service of such subpoenas.

Experience has shown that such subpoenas are frequently used not for

their purported purpose of gaining access to documents, but rather as an attempt to examine the communications, thought processes and reasoning of legislators during such investigations to determine legislative intent.

Also, it has been the experience that when the threatened issuance of a subpoena has been forestalled with a view towards permitting the orderly completion of the legislative investigation and the subsequent review of the transcripts, exhibits, reports and conclusions of the investigative committee, the public is better served and the entity seeking the subpoena obtains as much or more useful information than might otherwise have been developed.

The continued viability of the Third Circuit decision will result in the ability of any United States

Attorney to subpoena a state legislature's records and force any or all members of a legislature and legislative staff to appear before a grand jury. Acquisition of legislative records, for even a brief period, would be very disruptive of the legislative process. Additionally, the decision below allows the United States Attorney to send a daily or weekly subpoena to obtain updates on the legislature's deliberations, hearings and even executive or closed sessions. It injects the United States Attorney into the legislative investigation process as though such Attorney was a member of the legislative body. As a result of the decision below, legislators could be subjected to intense scrutiny by any United States Attorney for their reasoning or thought processes, communications and deliberations.

The potential for disruption of ongoing legislative fact-finding and an orderly legislative process is real and dangerous. The decision sets the stage for either conscious or unconscious unwarranted judicial intermeddling in the legislative function at the behest of an overly zealous prosecutor.

The continued viability of the decision of the Third Circuit will adversely affect the interests of this amicus in unfettered fact-finding necessary to legislate for the public good. The decision of the Third Circuit also has the potential to impact further on the legislative function to the detriment of the legislative process of a state legislature.

This amicus submits that the decision below is erroneous. Because this Court's decision upon review of the decision of the Third Circuit will have

a direct impact on matters of prime importance to amicus, amicus submits this brief to assist this Court in resolution of this important matter.[1].

Amicus hereby adopts and fully incorporates by reference, the same as if set out herein in full, the arguments of the Petitioners' Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit filed with this Court which are set forth on pages six (6) through seventeen (17), inclusive, under the caption "REASONS FOR GRANTING THE WRIT."

The Third Circuit decision not only conflicts in principle with this Court's prior pronouncements and decisions of other Circuits, as set out in Petitioners' argument, but also does violence to the principles of the

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1. Per Court Rule 36, the parties have consented to filing this brief, evidenced by their letters filed with the Clerk.

doctrine of legislative immunity. The decision in effect sets up a conflict which, if not resolved by this Court, may well cause considerable interference with the state legislative process.

CONCLUSION

For the foregoing reasons, this amicus on behalf of the Kansas Legislature respectfully submits that this Court should grant Petitioners' petition for a writ of certiorari.

Respectfully submitted,

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November 2, 1987

CERTIFICATE OF SERVICE

The undersigned, ROBERT A. COLDSNOW, a member of the Bar of this Court and counsel of record for Amicus Curiae Kansas Legislative Coordinating Council, hereby certifies that on the 2nd day of November, 1987, he caused to be served the foregoing Brief of The Kansas Legislative Coordinating Council as Amicus Curiae In Support of Petitioners by placing in first class U.S. Mail, postage prepaid, three copies thereof to each counsel of record for the petitioners and respondent and the Solicitor General as follows:

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